Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

PORT OF PORTLAND,

Petitioner,

v.

DONALD RONNE and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a single industrial accident causes a knee injury that substantially reduces the worker's ability to earn and, after the worker's retirement, a totally disabling back injury, should the compensation payable under the Longshore and Harbor Workers' Compensation Act for that total disability be measured by (a) wages earned before the knee injury or (b) the actual economic loss caused by the back injury?

PARTIES TO THE PROCEEDING

The parties to the proceeding resulting in the decision sought to be reviewed are:

Port of Portland (Oregon);

Donald R. Ronne; and

Director, Office of Workers' Compensation Programs, United States Department of Labor.

At all times material to this proceeding, the Port of Portland was authorized to self-insure its liabilities under the LHWCA. The Port of Portland has no parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the Ninth Circuit (Appendix, *infra*, 1-15) is reported at 192 F.3d 933. The Decision and Order of the Benefits Review Board (App., *infra*, 16-23) and the Decision and Order of the Administrative Law Judge (App., *infra*, 24-42) are unreported.

JURISDICTION

The Decision of the United States Court of Appeals was filed on September 27, 1999 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 2(2), 2(10), and 10 of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. §§ 902(2), 902(10), and 910, provide in relevant part as follows:

> 2(2) "The term 'injury' means accidental injury or death arising out of and in the course of employment . . . or as naturally or unavoidably results from such accidental injury . . . "
>
> 2(10) " 'Disability' means incapacity because of injury to earn the wages the employee was receiving at the time of injury . . . "
>
> 10 "Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of injury shall be taken as the basis upon which to compute compensation . . . "

STATEMENT

Introduction

The LHWCA provides compensation for disability caused by occupational disease and two categories of injuries, (a) those that occur on the job and (b) those that occur *outside* the "time and space" boundaries of maritime work but are a "natural or unavoidable" consequence of an earlier on-the-job injury.

This case involves injuries in both categories, two – both partially disabling knee injuries – that occurred on the job and one – a totally disabling back injury – that occurred after the worker's retirement. It presents the question of whether compensation payable for disability caused by a post-retirement "consequential injury" must be separately calculated in accordance with Section 10's requirement that the worker's earning capacity at the "time of injury shall be taken as the basis upon which to compute compensation."

Despite Congress' clear intent to distinguish "injury" from both "accident" and "disability" and this Court's requirement in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, at 199-200 (1952) that the terms be distinguished, the absence of a uniform "time of injury" definition continues to plague the administration and adjudication of this national compensation system.

The Ninth Circuit holds firmly to the position, first announced in *Johnson v. Director, OWCP*, 911 F.2d 247, at 248 (9th Cir. 1990), *cert. denied sub nom., Todd Pacific Shipyards Corp. v. Director, OWCP*, 499 U.S. 959 (1991), that

"time of injury" means "time when the disability attributable to the injury became manifest." The Fifth Circuit has elected a different approach, holding that "time of injury" means "the time of the accident causing the injury." *LeBlanc v. Cooper/T. Smith Stevedoring Inc.*, 130 F.3d 157, at 161 (5th Cir. 1997).

Neither interpretation is consistent with the "injury" definition applied within the District of Columbia Circuit. See, *Stancil v. Massey*, 436 F.2d 274, at 276 (D.C. Cir. 1970) (" 'injury' [refers] to the harmful physical (in some instances, psychological) consequences of that event [the 'accident'] which need not occur or become obvious simultaneously with the event.").

The problems created by the conflicting definitions of "time of injury" have been magnified by the Ninth Circuit's refusal in this case to compute the compensation payable for disability caused by an *off-the-job* consequential injury by the same method followed when all injuries occur *on-the-job*, i.e., in accordance with the rule first established in *Hastings v. Earth Satellite Corporation*, 628 F.2d 85, at 90 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 905 (1980):

> "Where, as here, two injuries befall an employee, the employee's earning capacity during the time preceding the second injury must be the basis of computing benefits attributable to the second injury."

Although it follows the *Hastings* methodology whenever all injuries occur during employment (*Brady-Hamilton Stevedore Company v. Director, OWCP*, 58 F.3d 419, 421 (9th Cir. 1995)), the Ninth Circuit has in this case adopted

a different rule – one requiring focus upon maritime earnings – even when the consequential injury occurs *after* the worker's departure from maritime employment.

The Ninth Circuit justified blending all of the injuries and disabilities experienced by Mr. Ronne into one by stating that "Ronne's disabling back condition was not a distinct injury but a continuation of the October 1989 knee injury" and by describing the post-retirement back injury as having "occurred naturally and unavoidably from [the knee injuries]." (App. 4, 8) These characterizations do not (and, presumably, were not intended to) connote a medically impossible "the knee bone is connected to the back bone" relationship among the injuries. They are instead references, couched in terms similar to those used in Section 2(2) itself, to a fundamental concept of compensation law that is formally labeled "the rule of compensable consequences."

An explanation of that rule provides the final element of the general background necessary to an assessment of the degree to which the Ninth Circuit has violated Section 10's command that compensation be based upon "time of injury" earning capacity and has thereby transformed the application of the LHWCA.

The Rule of Compensable Consequences

The "rule of compensable consequences" attaches a broad range of additional liabilities onto those directly attributable to a maritime injury. Most simply stated, the rule – the means for determining the scope of the

LHWCA's coverage for off-the-job injuries – presumes the presence of *two* injuries and provides that

> "a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of the original injury." (Vol. 1, A. Larson, *The Law of Workmen's Compensation*, Section 13.11, page 3-503 (1993))

As currently applied, the rule's requirement that the subsequent injury be a "direct and natural result of the original injury" is met whenever post-employment injuries or events have not "overpowered and nullified" the contributing effects of the on-the-job injury. See, *Jones v. Director, OWCP*, 977 F.2d 1106 (7th Cir. 1992) (There must "be some connection between the [subsequent] injury and the employment, and the causal effect attributable to the employment must not have been overpowered and nullified by influences originating entirely outside the employment."), cited with approval in *Port of Portland* at 192 F.3d 938 (App. 9), and *Shell Offshore v. Director, OWCP*, 112 F.3d 312 (5th Cir. 1997).

For the Ninth Circuit's original statement of the rule, see *Cyr v. Crescent Wharf and Warehouse Co.*, 211 F.2d 454, 456 (9th Cir. 1954):

> "[W]e reject the thesis that Section 902(2) limits recovery for subsequent injury to disease or infection . . . [W]e hold that the part of the section worded, 'or as naturally or unavoidably results from such accidental injury' covers injuries through accidents which happen subsequently to a primary injury. In a sense, to be compensable, the second injury must be as a

> part of the original injury. If the two are separated by an intervening cause, the second injury is not a part of the first injury."

As *Cyr's* statement makes clear, the rule applies only when an on-the-job injury *directly* subject to the LHWCA contributes to the off-the-job occurrence of *another* injury and brings within the scope of the LHWCA a variety of off-the-job injuries that would otherwise not satisfy the requirement that they arise "in the course of" maritime employment. See, 33 U.S.C. § 902(2).

> "Arising 'out of' and 'in the course of' employment are separate elements: the former refers to injury causation; the latter refers to the time, place, and circumstances of the injury. Not only must the injury have been caused by the employment, it must also have arisen during the employment."

U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, at 613 (1982).

The rule's scope is broad, encompassing a wide variety – one limited only by the range of forensic imagination – of "miscellaneous consequences with some causal relation to compensable injury." See, generally, *Larson, supra,* at Sections 13.11(a) through (c). The rule has no intrinsic time limitations tied to the date of the accident, the first injury, or even the last day of maritime employment.

Perhaps most importantly, the potential for further liability for disability, death, and medical expenses caused by a later injury brought within the Act by the rule is not extinguished even if all other aspects of the original injury are settled in accordance with 33 U.S.C.

§ 908(i). See, 20 C.F.R. Section 702.241(g) ("An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence.")

There is only one exception to the rule's imposition of continuing responsibility. The exception arises when the partially disabled worker continues in maritime employment and subsequent *on-the-job* activities are *a* cause of the subsequent injury.

When that occurs, liability for the resulting additional disability shifts from the first to the later employer and, pursuant to *Hastings*, the compensation payable for that additional disability is measured after offset for the reduction in earning capacity caused by the first injury.[1]

The issue in this case is whether the compensation payable to previously injured workers who have retired or for other reasons shifted to lower paying *non*-maritime work before they experience additional injuries brought within the LHWCA by the "rule of compensable consequences" should be calculated (a) in the same manner

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[1] Except for the fact that Mr. Hasting's second injury arose during work and Mr. Ronne's occurred after retirement, the factual scenarios are similar. *Hastings* involved a partially disabling on-the-job stroke followed three years later by development of totally disabling pulmonary emboli and phlebitis. The stroke had limited Mr. Hastings to sedentary part-time work. Unlike Mr. Ronne, he chose to work and prolonged periods of on-the-job sitting resulted in the emboli and phlebitis. Also unlike Mr. Ronne, Mr. Hastings failed in his attempt to persuade the court to backdate his totally disabling last injury to time of the first.

applied to those injured again during the course of continued maritime employment or (b) in a manner that ignores the decline in wage-earning capacity caused by the first injury and, as a result, overcompensates for the actual economic loss caused by the second.

The Facts Relevant To The Issue

Mr. Ronne injured his knee on two occasions, first in 1988 and again in 1989. Those knee injuries precluded his continued work as a longshoreman but did not cause him to become permanently and totally disabled. (App. 17) Despite the limitations caused by the knee problems, he retained an off-the-waterfront earning capacity of $170 weekly and, because the knee injuries had not entirely eliminated his ability to work, his recovery for the disability caused by them was limited by the LHWCA's "schedule." 33 U.S.C. § 908(c)(2). (App. 18-19) The Port of Portland has paid all "scheduled" compensation due.

Mr. Ronne did not return to employment of any kind after the second knee injury. He chose not to accept the non-maritime jobs proven available to him and retired. In mid-1992, however, he began to experience back problems as a result of continued walking with a gait made "awkward" by his knee injuries. The back problems erased Mr. Ronne's remaining capacity for employment of any kind and increased his disability from "partial" to "total." (App. 34-35)

As required by the "rule of compensable consequences," the Port of Portland accepted responsibility for the lower back condition and the total disability caused by it. (App. 3) However, the Port contended that the

compensation payable for total disability should reflect only the actual additional economic loss caused by the back injury – the loss of $170 of potential weekly earnings – and should not be based upon wages earned before the knee injuries had themselves reduced Mr. Ronne's earning capacity.

The Administrative Law Judge rejected this contention, adhering to the Benefits Review Board's previous ruling that "in natural progression cases, the average weekly wage is calculated at the time of the initial injury." (App. 40) The Board affirmed because, in its view, only amounts earned before *on-the-job* injuries may serve as the basis for calculating the amount of compensation due for additional disability caused by subsequent *off-the-job* injuries. (App. 22) See, also, *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Although the Board offered no explanation whatsoever for an interpretation that will *always* over-compensate for any additional disability caused by a post-retirement injury, the Ninth Circuit did attempt its own justification for affirming that interpretation.

> " . . . Ronne's back symptoms were 'irrevocably fixed' when he suffered the knee injury, even though they did not manifest themselves until he had been walking on the damaged knees for a period of time. *See Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 819 (1st Cir. 1991). This is not a situation where the date of disability occurred much later. We find no reason that this analysis should change merely because the knee injury led to back problems and total disability years later." (App. 8)

* * *

"It is a truism that damages follow from liability. Thus, the logic of these natural progression cases should be extended to grant compensation at the time the worker no longer can perform his former employment because of partial disability, even when total disability "naturally" results later. This conclusion is supported by the 'humanitarian purposes' of the LHWCA, as well as by our mandate to construe liberally its provisions to resolve all doubts in favor of claimants, even if some overcompensation results. [citations omitted]" (App. 10)

REASONS FOR GRANTING THE PETITION

The Port of Portland does not challenge the rule that made it responsible for the additional economic loss that followed the 1992 back injury. It simply contends that the Ninth Circuit erred when it required the Port of Portland to pay compensation at an initial weekly rate of nearly $650 – with cost-of-living adjustments, now over $900 – for a back injury that actually reduced Mr. Ronne's ability to earn by only $170.

The ruling below merits this Court's review because the Ninth Circuit's misapplication of the rule of compensable consequences and its refusal to base Mr. Ronne's award for total disability upon the reduced earning capacity present at the time of the back injury

(a) provides compensation for the knee injuries that far exceeds the "scheduled" benefit that

this Court clearly ruled to be exclusive in *Potomac Electric Power Company v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980); and

(b) trespasses across the boundary between legislative and judicial authority by creating a new "retiree compensation" system offering a level of benefits that (1) exceeds the amounts determined appropriate by Congress and (2) violates the requirement – emphasized by this Court in *Metropolitan Stevedore Company v. Rambo (Rambo II)*, 521 U.S. 121, at 130 (1997) – that the LHWCA compensate a worker for only "the actual economic effects of his injury."

A. The Ninth Circuit's Ruling Stands In Stark Contrast To This Court's Decision In *PEPCO*. It Blends Categories of Injuries And Classes Of Disability That Congress Clearly Intended To Be Separate.

The distinctions among "accident," "injury," and "disability" drawn by Congress and emphasized by this Court are not the only lines blurred beyond recognition by the ruling below. By basing Mr. Ronne's compensation for the total disability that resulted from the combination of the knee and back injuries upon wages earned before the initial "scheduled" injury and disability, the Ninth Circuit trespassed across two additional, equally fundamental, demarcations crafted by Congress and previously enforced by this Court.

The LHWCA identifies a variety of injuries – those to the extremities plus losses of vision and hearing and "disfigurement" – for which a conclusive degree of disability is established. For so long as a "scheduled" injury

does not itself cause total disability, compensation is based upon the degree of medical impairment and paid for a specified period of time. See, 33 U.S.C. §§ 8(c)(1-20), (22).

In all "other cases," however, a proven loss of wage-earning capacity is an element of the claimant's case and the amount of compensation payable is measured by the difference between pre- and post-injury earning capacities. 33 U.S.C. § 908(c)(21). See, *Metropolitan Stevedore Company v. Rambo* (*Rambo I*), 515 U.S. 291, at 296-297 (1995).

This Court has previously recognized the borders between the "scheduled" and "nonscheduled" categories of injuries and the classes of compensable disability. In *PEPCO, supra,* the Court was faced with a situation in which the "humanitarian purposes" of the Act and the fact that the worker had experienced an *actual* loss of earnings that substantially exceeded Congress' benefit formula persuaded an Administrative Law Judge, the Benefits Review Board, and the Court of Appeals for the District of Columbia to cross those borders and award "nonscheduled" compensation for a "scheduled" injury.

This Court reversed because it found

> " . . . nothing in the statute itself to support the view that the reference to "all other cases" in Section 8(c)(21) was intended to authorize an alternative method for computation of disability benefits in certain cases of permanent partial disability already provided for in the schedule. The legislative history of the Act is entirely consistent with the conclusion that it was intended to mean what it says." (*PEPCO,* at 275)

The compensation ordered due and paid for Mr. Ronne's partially disabling knee injuries totaled slightly less than $37,000. (App. 43). Given the fact that the knee injuries reduced his weekly capacity to earn from over $960 to only $170, the proper "scheduled" amount was sufficient to replace only about one year of his *actual* economic loss. As others did in *PEPCO*, the Administrative Law Judge, the Benefits Review Board, and the Ninth Circuit have all attempted to make up for that shortfall by turning to the Act's "humanitarian purposes" and seeking a way around a perceived injustice in Congress' scheme.

The route chosen in this case required blending two injuries into one and rewriting Congress' system for compensating scheduled and nonscheduled injuries. This approach has given Mr. Ronne both his proper "scheduled" benefit and a "nonscheduled" bonus for his knee injuries measured by the difference between the ultimate weekly award ($642.43) and the actual amount ($170 weekly) lost as a result of the back injury. This is precisely what *PEPCO* forbids.

B. The Ninth Circuit's Ruling That Workers Disabled By Post-Retirement Injuries Should Receive Compensation Based Upon Pre-Retirement Earnings Is Inconsistent With Both Congress' Intent And This Court's Requirement That "Nonscheduled" Compensation Be Limited To The Actual Economic Effects Of Injury.

Congress has already considered the benefit levels appropriate for retirees "disabled" by the post-retirement

manifestation of long-latency occupational diseases and, for the vast majority of cases, has concluded that compensation should *not* be based upon employment earnings. This Court has already ruled that the compensation payable for disability caused by nonscheduled injuries should compensate the worker for only "the actual economic effects of his injury" and should charge the employer "for that amount alone." *Rambo II*, at 133.

The Ninth Circuit has determined that retirees disabled by post-retirement traumatic injuries should receive more than those suffering from occupational disease and has awarded a level of compensation for those injuries that *far* exceeds the actual economic loss experienced by the former workers.

Congress focused upon the amounts of compensation that should be paid to retirees in 1984. The need for change was generated by a Benefits Review Board decision holding that when the "injury" (the manifestation of asbestosis) did not occur until retirement had reduced the worker's earning capacity to zero, there was no "disability" and no right to compensation. See, *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984).

Congress responded quickly to *Aduddell* by establishing a special process for calculating the amounts of compensation payable for occupational diseases that do not "immediately result in death or disability." For *only* those "long-latency" diseases, the "time of injury" was redefined to be the date of the worker's awareness "of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. § 910(i).

If that date follows retirement by more than one year, Congress determined that compensation should be based upon the national average weekly wage and measured by specified medical guides. Only if that date falls within the first year following retirement is resort to employment earnings proper. The result is that retirees disabled by long-latency diseases now receive some compensation but, because they experience little or no actual economic loss as a result of their limitations, most receive far less than workers who remain actively employed. See, generally, *Bath Iron Works v. Director, OWCP,* 506 U.S. 153, 154-159 (1993).

The "special approach" developed for long-latency occupational disease demonstrates (a) Congress' policy determination that retirees who sustain no actual economic loss should receive less compensation than is paid to individuals actively employed at the time of injury and (b) Congress' choice to limit its special retiree benefit system to cases involving long-latency occupational disease. See, *LeBlanc, supra,* at 161:

> "By the plain language of Section 910(i), Congress chose to expressly limit the applicability of this "manifestation" theory to occupational diseases, *thereby simultaneously precluding its applicability to traumatic injury cases.*" (emphasis added)

Recognizing that the amount of the award of compensation for Mr. Ronne's post-retirement back injury violated the policies underlying Congress' actions in 1984, the Director, Office of Worker's Compensation Programs, attempted to persuade the Ninth Circuit that

retirees disabled by a combination of pre- and post-retirement traumatic injuries should be compensated *as if* the cause of the ultimate disability was an "occupational disease."[2]

The Ninth Circuit rejected that approach and, as a result, found itself faced with only two choices:

> (1) limit compensation to the actual economic loss caused by the "unscheduled" back injury; or
>
> (2) rewrite the LHWCA to include a second system of retiree compensation.

The Ninth Circuit chose the latter.

The Port of Portland contends that this judicial expansion of the statutory scheme is wholly inconsistent with Congress' clear intent and has the capacity to overwhelm the system. Moreover, the tortured rationale offered by the Ninth Circuit for this expansion demonstrates that there are few if any limits upon this Circuit's willingness to rewrite Congress' scheme to better comport with its own "humanitarian" views.

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[2] In Mr. Ronne's case, the Director's approach would have generated an award for total disability based upon the national average weekly wage at the time that Mr. Ronne first became aware of the relationship between his former employment, his back "disease," and his additional disability. Under the Director's proposal, Mr. Ronne would have received an initial weekly award of $226.10, $56.10 more than the Port of Portland's arguments would support and $416.33 less than the amount actually ordered paid.

Some very substantial obstacles stood between what the Ninth Circuit perceived as its "mandate" to construe the LHWCA

> "liberally [and] to resolve all doubts in favor of claimants, even if some overcompensation results." (App. 10)

After all, this Court had already ruled that "all doubts" should *not* be resolved in claimants' favor and that compensation should *accurately* reflect economic loss. See, *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, at 280-281 (1994) ("the true doubt rule . . . runs afoul of the APA") and *Rambo II, supra*, at 133.

Most Courts would have addressed these obstacles – and the hurdle presented by *PEPCO* – directly. The Ninth Circuit elected a different approach. It mentioned neither the obstacles nor *any* of this Court's decisions and, instead, conjured a route to its desired outcome from *Bath Iron*.

When Congress established its special system for compensating retirees in 1984, it also enacted new time limitations applicable to hearing loss claims but failed to specify whether those claims were subject to the new retiree benefit structure or remained within the traditional "schedule."

After two Circuits concluded that difficulties in establishing a "time of injury" for hearing loss justified placing those claims within the "retiree system" and a third disagreed, this Court addressed the conflict and, in *Bath Iron*, ruled that the compensation payable to a worker who *discovers* a work-related hearing loss after

retirement should be based upon earnings at the time of the last maritime exposure to harmful noise.

The rationale underlying this conclusion was undisputed medical evidence that deafness is the *immediate* result of exposure to excessive noise and that a worker's failure to notice his loss of hearing does not mean that it has not occurred. Based upon this evidence, this Court concluded that the "injury" occurred "simultaneously with that exposure" and, properly applying Section 10, ruled that compensation for hearing loss present before but not discovered until after retirement should be based upon earnings at the time the injury actually occurred. *Bath Iron, supra,* at 161-163, 165.

To the complaint that the Court's approach would require the employer to pay for additional hearing loss caused by aging during the interim between the injury and its discovery, the Court stated that "employers can protect themselves by providing their employees with an audiogram at the time of retirement and thereby freezing the amount of compensable hearing loss attributable to the claimant's employment." *Bath Iron, supra,* at 165.

Because *Bath Iron* had no apparent relevance to this proceeding – after all, Mr. Ronne's back condition was "nonscheduled" (*not* a "presumptively disabling" scheduled injury) and was *non-existent* (not merely "undiscovered") at the time of his retirement – no one, not any of the parties and neither the Benefits Review Board nor the Administrative Law Judge, had *ever* mentioned the case in argument or earlier decisions.

However, because the disability upon which the nonscheduled compensation was based had not arisen until

after retirement, the Ninth Circuit needed to find a path around its own previous holding that "time of injury" in Section 10 of the Act means "time of disability." See, *Johnson, supra,* at 250 ("Johnson suffered an 'accident' [in 1979], but was not 'injured' until [she was rendered] permanently disabled.")

Using *Bath Iron* as a template, it built that path around *Johnson* by simply rewriting the facts to fit *Bath Iron's* framework. Three wholly inaccurate statements comprised the ultimate concoction:

> (1) "Ronne's back symptoms were 'irrevocably fixed' when he suffered his knee injury;"
>
> (2) "This is not a situation where the disability occurred much later;" and
>
> (3) Ronne's "injury was 'complete' [at the time of his accident]." (App. 8)

When one recalls that Mr. Ronne's back problems did not *exist* until long after the knee injury and that the disability in question – the total disability caused by the back injury – did not arise until following retirement, it becomes clear that only this Court's exercise of its powers of supervision can curb the Ninth Circuit's willingness to find ways around Congress' command that compensation be based upon the earning capacity at the "time of injury."

Although there have been few cases in which retired maritime workers have sought compensation when post-retirement ailments combined with pre-retirement disabilities to foreclose all remaining possibility of further employment, the problems created by the Ninth Circuit's ruling are neither limited to this case nor minor.

The reason for the previous dearth of claims is obvious. For so long as "time of injury" in Section 10 is properly construed, there is little to be gained by seeking compensation for post-retirement injuries. Unless the worker overcomes the presumption that retirement has erased all earning capacity, the "weekly wage" upon which benefits must be based is $0.00.

However, with the Ninth Circuit's ruling that compensation for all post-retirement "consequential injuries" must be based upon active maritime employment earnings and with a current maximum benefit approaching $1000.00 weekly, the incentive to seek compensation has become very substantial.

When a previously injured knee causes back problems to develop while walking the retirement community's golf course or contributes to a fall at home and a subsequent broken hip, few former workers will ignore the temptation to seek such substantial supplemental income.

CONCLUSION

The boundaries of the LHWCA are not to be set by the Ninth Circuit's "humanitarian" instincts. They were, instead, drawn by Congress and clarified by this Court. They exist to assure that the system is applied in a manner that is both uniform and consistent with Congress' intent and language.

By stepping far beyond those proper boundaries, the Ninth Circuit has created a fourth system of compensation that will prove irresistible to previously disabled, now retired, workers seeking compensation for all of the effects of aging and off-the-waterfront injuries that can be causally linked to maritime employment.

This Petition for a writ of certiorari should be granted. Indeed, the decision of the Ninth Circuit departs so far from the established course of this Court's jurisprudence and Congress' purposes and policies that it merits a summary order granting the petition, vacating the order below, and remanding the case to the Ninth Circuit with instructions to reduce the award of compensation for total disability to the amount properly payable to a worker with a "time of injury" earning capacity of $170 per week.

DATED: December 17, 1999

Respectfully submitted,

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Counsel of Record for Petitioner

PORT OF PORTLAND; HELMSMAN NORTHWEST,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, & DEPARTMENT OF LABOR,
Respondents.

No. 98-70492

United States Court of Appeals
Ninth Circuit

Argued and Submitted July 13, 1999.

Decided Sept. 27, 1999.

Robert E. Babcock, Lake Oswego, Oregon, for the petitioners.

Joshua Gillelan and Sandra Falzone, United States Department of Labor, Washington, D.C.; Meagan A. Flynn, Pozzi Wilson & Atchison, Portland, Oregon, for the respondents.

Petition for Review of an Order of the Benefits Review Board. OWCP No. 14- 96262, 14-106287, BRB No. 97-831.

Before: FLETCHER, FERGUSON and TASHIMA, Circuit Judges.

FERGUSON, Circuit Judge:

Donald Ronne ("Ronne") filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or "Act"), 33 U.S.C. §§ 901 et

seq., for an injury to his knee that eventually led to total permanent disability. After a hearing, the administrative law judge determined, inter alia, that Ronne's disabling back condition was a "natural and unavoidable result" of the earlier knee injury, and therefore Ronne's compensation should be based on his average weekly wage at the time of the knee injury. The Benefits Review Board ("Board") affirmed. Port of Portland filed this petition for review, claiming that Ronne's benefits should be calculated as of the time total disability became manifest, not at the time he first suffered the injury. We hold that, where an employee's total disability naturally progresses from a single accidental injury, the employee should be compensated at the average weekly wage rate as of the time of the accident if he cannot return to his former employment after that time.

I. BACKGROUND

Donald Ronne had worked as a longshoreman since 1953, most recently for Port of Portland. On December 5, 1988, Ronne suffered a knee injury while working on the deck of a vessel. He temporarily ceased working and underwent surgery. Dr. Ira Weintraub, the doctor who performed the surgery, released Ronne to work at full duty in August 1989, although noting that he suffered a 20% permanent knee impairment.

Ronne's return to work, however, was short-lived. On October 29, 1989, while climbing a crane, he suffered severe knee pain. This new injury again forced him to stop working. Dr. Weintraub never released Ronne to return to longshore work, and he has not returned to any

type of work since the injury. Ronne underwent two more knee surgeries over the next two years. The last one was performed on March 4, 1992.

By July 1992, Ronne started complaining about lower back pain. The pain persisted throughout 1993. Ronne, then age 64, tried to find work either as a security guard or a parking lot attendant, but met with no success. In December 1993, Dr. Weintraub interpreted an MRI scan as showing "some broad-based disc bulging." Ronne was referred to a neurosurgeon, Dr. Mason, who diagnosed him with a narrowing of the lumbar canal and with a probable herniated disc. Both Dr. Mason and Dr. Weintraub shared the opinion that Ronne's back problem resulted from his knee injury, which caused him to walk with an awkward gait. Ronne elected to treat his back conservatively with physical therapy, although Dr. Mason had recommended surgery.

Ronne then filed this claim for benefits under the LHWCA. The parties stipulated that (1) Ronne could not return to waterfront work after his October 1989 knee injury; (2) his average weekly wage at the time of his first knee injury in 1988 was $963.64; and (3) his back condition was a secondary result or consequence of his 1989 knee injury. The ALJ concluded that Ronne was totally disabled after his third knee surgery on March 4, 1992 and could not perform any work. However, the ALJ found, between November 29, 1990 and March 4, 1992, Ronne could have found and performed suitable alternative work in the area as a parking lot attendant or a security guard. The ALJ granted benefits to Ronne for periods of temporary and partial permanent disability

prior to March 4, 1992.[1] The judge also granted total disability benefits to Ronne after March 1992 based on his average weekly wage at the time of his second knee injury in 1989.[2] The ALJ determined that Ronne's average weekly wage in 1989 was $963.64 since Ronne did not suffer any decrease in earning capacity between the two knee injuries. It is only this latter award of total disability benefits that Port of Portland challenges here.

The ALJ held that Ronne's disabling back condition was not a distinct injury but a continuation of the October 1989 knee injury. Applying the Board's precedent in *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991), the ALJ concluded that in "natural progression" cases, such as Ronne's, the average weekly wage is calculated as of the time of the initial traumatic injury. The Board affirmed, holding that the compensable injury was Ronne's knee injury, and therefore, benefits for the consequential back condition must be calculated based on his average weekly wage at the time of the knee injury. We

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[1] Specifically, the ALJ awarded Ronne temporary total disability compensation from December 6, 1988 to August 13, 1989 and from October 30, 1989 to November 29, 1990. On November 29, 1990, Dr. Weintraub released Ronne to perform "some more sedentary type work." Accordingly, the ALJ awarded Ronne permanent partial disability from that date until he became totally disabled following his third knee surgery.

[2] The ALJ granted temporary total disability payments for the period from March 4, 1992 to April 8, 1994, the date on which Dr. Mason recommended back surgery for Ronne. The ALJ concluded that, by then, Ronne's back condition was of "infinite duration." He awarded permanent disability payments beginning at that time.

review the Board's decision for errors of law and for its adherence to the substantial evidence standard for reviewing the ALJ's findings of fact. *See Alcala v. Director, OWCP*, 141 F.3d 942, 944 (9th Cir. 1998).

II. DISCUSSION

A. Time of Injury

Port of Portland argues that the Board's compensation decision is inconsistent with this circuit's precedent and with the LHWCA, which requires that compensation for Ronne's knee injury be "factored out" of any award for total disability. Accordingly, Port of Portland contends that Ronne's benefits should be based on his projected earning capacity as a security guard or parking lot attendant at the time immediately preceding the manifestation of his back problem. That weekly wage is $170. The Director of the Office of Workers' Compensation Programs also rejects the Board's calculation of Ronne's award, but for a different reason. The Director urges us to consider Ronne's back condition an occupational disease, entitled to special provisions under the Act. Under these provisions, Ronne's benefits should be based on a national average weekly wage rate of $369.15.

The LHWCA uniformly sets both liability and compensation from the "time of injury." The Act provides that compensation shall be based on the injured worker's average weekly wage at the time of the injury. 33 U.S.C. §§ 908(a) and 910. Disability also is defined as the inability to earn wages, that the employee was receiving at the time of injury. 33 U.S.C. § 902(10). The Act defines "injury" as "accidental injury . . . arising out of and in the

course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury. . . . " § 902(2). For occupational diseases that do not immediately result in disability, the Act defines "time of injury" as the date the claimant becomes aware or should have been aware of the relationship between his employment, the disease, and the disability. § 910(i). If the employee has been retired for longer than one year after this date, the average weekly wage is the national average weekly wage at that time. § 910(d)(2)(B). Unlike the provisions for occupational diseases, the Act does not define "time of injury" for accidental injuries. We have recognized, however, that in most cases of traumatic injury the date of injury and the date of disability coincide. *See Johnson v. Director, OWCP*, 911 F.2d 247, 249 (9th Cir. 1990) (citing *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1288 (9th Cir. 1983)).

Port of Portland contends that our decision in Ronne's case is controlled by *Johnson*. In that case, we held that the victim of a traumatic accident, like the victim of an occupational disease, should be compensated at the average weekly wage rate at thc time his latent disability manifested itself, not at the time of the accident. *Id.* at 250. Margaret Johnson had fallen through an opening in a vessel, injuring her hands, wrist and hip. She continued to work for years afterward, despite some pain and swelling, but eventually had to cease work altogether.

We find *Johnson* distinguishable from the situation here. *Johnson* applied to a case where the disabling symptoms of an earlier accident did not appear for years after

the accident. The court clearly analogized the manifestation of "latent and unknown injuries" in accidental injury cases to the rationale for making "time of injury" in occupational disease cases coincide with the manifestation of disability. *Id.* at 249. The court's reasoning was based chiefly on the fact that Johnson continued to work after her accidental injury, as is true for workers exposed to asbestos, for example. Without a rule extending the time of injury in occupational disease cases to latent accidental injuries, workers like Johnson would not receive the benefit of the higher wage they had accumulated because they could continue in their waterfront employment. *Id.* at 250. In other words, they had not suffered any decrease in earning capacity, or disability.

Ronne's situation is quite different from Johnson's, however. Ronne's disability, as the term is used in the LHWCA, was not latent since he suffered significant loss of earning capacity when he injured his knee in 1989. He was disabled from the moment he suffered that knee injury and was never released to continue his employment as a longshoreman. Instead, his disability eventually became total and permanent when his back problem arose as a result of the knee. Accordingly, unlike Johnson, his income at the time of total disability was significantly less than his income at the time of his partial knee disability. The fact that he could have received a substantially lower wage in some other job before his back symptoms arose does not involve *Johnson*'s rationale of encouraging workers to return to the same employment.

Rather, Ronne's case is more like the claimant's occupational hearing loss in *Bath Iron Work Corp. v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993).

In *Bath Iron Works*, the Supreme Court considered how benefits should be calculated when a worker retired and later learned that he suffered from work-related hearing loss. The Court accepted the Director's characterization of latent hearing loss as an injury which occurs simultaneously with disability, that is, it is presumptively disabling. *Id.* at 163-64. The Court approved of setting "time of injury" for compensation purposes as of the date of last exposure to the excessive noise, rather than the date of manifestation of hearing loss symptoms. *Id.* at 164-65. *See also Ramey v. Stevedoring Servs. of Am.*, 134 F.3d 954, 962 (9th Cir. 1998) (endorsing date of last exposure over date of diagnosis). Ronne's knee injury, like occupational hearing loss, is a "scheduled" injury and therefore presumptively disabling on the day of his fall. Unlike the circumstances in *Johnson*, Ronne's disability occurred at the time of the accident. The injury was then "complete" in the sense that any exacerbation of the problem occurred naturally and unavoidably from that injury. *See Bath Iron Works*, 506 U.S. at 165. That is, Ronne's back symptoms were "irrevocably fixed" when he suffered the knee injury, even though they did not manifest themselves until he had been walking on the damaged knees for a period of time. *See Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 819 (1st Cir. 1991). This is not a situation where the date of disability occurred much later. We find no reason that this analysis should change merely because the knee injury led to back problems and total disability years later.

Moreover, a "natural progression" rule that compensates traumatically injured employees from the time

when they can no longer perform their former employment comports with common sense, with the LHWCA, and with the policies behind the Act. In other provisions of the Act, we and our sister circuits have distinguished "natural progression" cases for purposes of assigning liability to employers. In determining which employer is liable under the Act in cases of traumatic injury, for example, we have held: "If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible." *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 624 (9th Cir. 1991) (citing *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986)). Besides this so-called "last employer rule," we also have distinguished "aggravation" of injury cases from natural progression cases for purposes of determining the extent of an employer's liability, and hence the employee's compensation. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991) (discussing the aggravation rule which compensates an employee for the entire resulting disability when an employment injury aggravates a pre-existing condition). *See also Jones v. Director, OWCP*, 977 F.2d 1106, 1110-12 (7th Cir. 1992) (aggravation of worker's injury was a "natural" result under the Act's definition of injury such that worker's original employer was not relieved from full liability).

Additionally, courts have applied natural progression principles in deciding whether an employer is entitled to some financial relief under the special fund provision of the Act. *See* 33 U.S.C. § 908(f). A prerequisite to that relief is that the employee suffer a "second injury" or work-

related aggravation of pre-existing condition. *See Transbay Container Terminal v. United States Dep't of Labor Benefits Review Bd.*, 141 F.3d 907, 910 (9th Cir. 1998); *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 319-20 (9th Cir. 1980). But "[w]hen total disability results from nothing more than the natural progression of a pre-existing partial disability, the total disability cannot be a second injury," prohibiting the employer from obtaining relief from the special compensation fund. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316 (11th Cir. 1988) (emphasis added). It is a truism that damages follow from liability. Thus, the logic of these natural progression cases should be extended to grant compensation at the time the worker no longer can perform his former employment because of partial disability, even when total disability "naturally" results later. This conclusion is supported by the "humanitarian purposes" of the LHWCA, as well as by our mandate to construe liberally its provisions to resolve all doubts in favor of claimants, even if some overcompensation results. *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (9th Cir. 1998). *See also Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953) (the LHWCA "must be construed in conformance with its purpose, and in a way which avoids harsh and incongruous results").

B. Occupational Disease

In affirming the Board's natural progression rule, we reject the Director's position that Ronne's disabling back condition qualifies as an occupational disease. We accord considerable weight to the Director's construction of the LHWCA. *See Force v. Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991). Our deference, however, is limited

because that interpretation is only a litigating position, not a regulation. *See McGray Constr. Co. v. Director, OWCP*, No. 96-70041, 1999 WL 415343, at *5 (9th Cir. June 22, 1999). Moreover, although the Director tries to frame its view of Ronne's back condition as a matter of statutory construction, it is more properly a factual issue to which we owe no agency deference. In any event, we cannot properly defer because the Director's overbroad definition of occupational disease is not reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). It does not comport with the generally accepted definition of occupational disease and is inconsistent with the structure of the LHWCA.

The Director contends that Section 2(2) of the Act sets out a separate category of occupational disease or infection that "naturally and unavoidably" arises from work-related accidental injuries. Ronne's "degenerative back disease," as the Director calls it, falls into such a category, and therefore he should receive compensation under the Act's special provisions for those diseases. The Act does not define occupational disease. However, its definition of injury is not "easily susceptible" to the Director's view. *See Force*, 938 F.2d at 984. The entire structure of the Act, as well as its definition of injury, clearly distinguish between "accidental" injuries and occupational diseases as injuries. The fact that the Act contemplates that an "occupational disease or infection" may result from accidental injury does not explain anything about what medical conditions qualify as occupational diseases, nor does it mean that Ronne's back condition is such a disease.

Rather, workers' compensation law generally defines occupational disease as "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir, 1989) (citing 1B A. Larson, The Law of Workmen's Compensation § 41.00, at 7-353). Nearly every court that has considered whether an injury under the Act is an occupational disease has accepted this definition, and so do we. *See LeBlanc v. Cooper/T Smith Stevedoring Inc.*, 130 F.3d 157, 160 (5th Cir. 1997); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 752 n.2 (1st Cir. 1992); *Gencarelle*, 892 F.2d at 176. The definition also comports with the generally accepted definition of "occupational" as "of, relating to, or caused by engagement in a particular occupation." Webster's II New College Dictionary (1995) (emphasis added). Thus, the disability must arise from conditions peculiar to the claimant's employment or particular line of work. *See also Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 68 (2d Cir. 1985) (where increased risks of a hazard peculiar to the nature of employment aggravate a preexisting condition, the resultant disability may be treated as an occupational disease). Ronne's back problem arose from walking on a knee that he injured at work and not from any conditions or activities particular to his job as a longshoreman.

The Director cites *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389-90 (1st Cir. 1981) to support his position that Ronne's back condition is an occupational disease. There, the court addressed the employer's argument that the work-related aggravation of the employee's pre-existing

varicose vein condition was neither an accidental injury nor an occupational disease within the meaning of the Act. The court rejected a cramped view of "accidental injury" that would read a forseeability requirement into the term, and did not reach the issue of whether Gardner's injury was an occupational disease. *Id.* at 1390 n.3. The case does not speak to the relevant issues here and does not support the Director's position. In particular, Gardner's varicose vein aggravation did not result from an isolated accident at work, and the ALJ specifically found that particular conditions of employment, which required Gardener to stand, contributed to his total disability.

Instead, we find support for a slightly more restricted view of "accidental injury" and "occupational disease" under the Act in *Bath Iron Works*, 506 U.S. at 163. There, the Court agreed that occupational hearing loss, despite its latency, did not qualify as an occupational disease that does not result in immediate disability. In 1984, Congress enacted amendments to the Act creating special provisions for occupational diseases, but only for such diseases that did not immediately result in disability or death. *See* 33 U.S.C. §§ 902(10), 908(c)(23), 910(d)(2), 910(i). As the court of appeals explained, and the Supreme Court agreed, this "third system" of compensation under the Act applied only to job-related injuries or diseases that did not become apparent until after retirement. *See Bath Iron Works*, 942 F2d at 813. In fact, reports showed that Congress primarily was concerned with "long-latency" occupational diseases in amending the LHWCA. *See, e.g., H.R.. Rep.* No. 98-570, at 10 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2734, 2743 (describing the

amendments as insuring that long-latency occupational disease claimants do not continue to face procedural hurdles). Thus, even if Ronne's back condition could be called an occupational disease, we disagree with the Director that the Act's third compensation system applies here because of our earlier holding: Ronne's injury did immediately result in disability and was apparent before retirement. His back problem is not the long-latency condition with which Congress was concerned in the 1984 amendments.

Congress' recognition that occupational disease or infection may result from accidental injury does not mean that these types of injuries are conflated. If anything, it seems more likely that what Congress had in mind in singling out this category was to include latent infections which result from traumatic injuries as "injuries" under the Act. The language describing "occupational disease or infection" as arising from accidental injury was part of the original statute. Congress specifically used this language because it was included in the "best" state compensation laws at the time, particularly New York's law. *See* 68 Cong. Rec. 5412 (1927). The New York statute specified the diseases which qualified as "occupational diseases" entitling the claimant to compensation. *See* N.Y. Work. Comp. § 3(2) (McKinney 1999) (listing poisonings; dust diseases; respiratory, gastro-intestinal, nerve, eye, and skin disorders within certain hazardous employments and within particular activities). Back problems arising from a traumatic injury clearly were not intended as occupational diseases under this scheme.

In any event, an occupational disease still must be particular to the employee's work conditions, as even the

Gardner court acknowledged. Walking, which led to Ronne's back symptoms, certainly was not all activity particular to his employment. It is this issue which the Director's view of occupational disease ignores. If Congress believed that every medical problem that resulted from an isolated traumatic injury was an occupational disease, it would have had no reason to distinguish accidental injuries and occupational diseases under the Act. Congress merely could have had the definition of injury turn on whether the disability was latent or non-latent. Instead, the compensation structure of the Act depends upon the type of injury the claimant suffered, and thus the Director somehow must set the parameters of what constitutes an occupational disease, which it does not do here. We do not find the Director's position reasonable.

III. CONCLUSION

Substantial evidence supports the ALJ's finding of fact that Ronne's back condition naturally progressed from his earlier knee injury, the combination of which made him totally and permanently disabled. Since Ronne could not return to longshore work from the time of his partially disabling knee injury, and earned no wages after that date, the time of injury for purposes of all compensation is the time he suffered the knee injury. That is the date of Ronne's disability.

AFFIRMED.

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 97-831

DONALD RONNE Claimant-Respondent v. PORT OF PORTLAND and HELMSMAN NORTHWEST Employer/Carrier-Petitioners	**NOT-PUBLISHED** DATE ISSUED: FEB 26 1998 DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Pozzi, Wilson, Atchison, L.L.P.), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-261, 96-LHC-262) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.* 380 U.S. 359 (1965).

Claimant twice injured his knee during the course of his employment as a longshoreman. On December 5, 1988, he slipped, landing on his knees and elbows, and he was diagnosed with a complex tear of his right medial meniscus. Claimant underwent medial meniscectomy on February 14, 1989, Cl. Exs. 1, 14-15, and he was released to return to full duty work on August 14, 1989. On September 21, 1989, Dr. Weintraub, claimant's treating orthopedist, assessed a 20 percent permanent impairment of the right leg. Cl. Ex. 15; Emp. Ex. 15. However, on October 29, 1989, claimant re-injured his right knee in a new work accident. Cl. Ex. 15, 19. He ceased working and was diagnosed with a Baker's cyst, and he underwent a second knee surgery (a partial medial meniscectomy and debridement) on January 24, 1990. Cl. Ex. 15. Claimant has not been permitted to return to longshore work since the second injury. Tr. at 207.

Because claimant's knee did not noticeably improve, Dr. Weintraub considered him a candidate for a third knee operation, a tibial osteotomy. Cl. Ex. 15. On March 4, 1992, claimant underwent the surgery. Cl. Ex. 32. By July 23, 1992, claimant began expressing concerns about pain in his lower back and hip. On December 15, 1992, Dr. Weintraub considered claimant's knee medically stationary and assessed a 35 percent impairment to the right leg.

Tr. at 201. Claimant's back pain persisted throughout 1993, and in April 1994, Dr. Mason, a neurological surgeon, diagnosed a narrowing of the lumbar canal at L4-5 and probable herniation at L5-S1. Cl. Ex. 48. Dr. Mason concluded that claimant's back problems were a direct result of his knee problems. Cl. Ex. 49.

Claimant and employer stipulated that claimant has been unable to return to his usual work since October 29, 1989, and that claimant's back condition is a sequela of his knee problems. Decision and Order at 1. The administrative law judge awarded claimant benefits for his injuries, and between December 5, 1988, the date of claimant's first knee injury, and April 8, 1994, the date on which final permanency was declared, claimant had periods of temporary total disability and permanent partial disability.[1] Decision and Order at 7. Pertinent to this appeal, the administrative law judge found that claimant established a *prima facie* case of total disability after his second knee injury in October 1989; however, he also

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[1] The administrative law judge awarded benefits for the following periods:

> December 6, 1988-August 13, 1989 – temporary total disability
>
> October 30, 1989-November 29, 1990 – temporary total disability
>
> November 30, 1990-March 3, 1992 – scheduled permanent partial disability
>
> March 4, 1992-April 7, 1994 – temporary total disability
>
> April 8, 1994 and continuing – permanent total disability

Decision and Order at 10.

found that employer established the availability of suitable alternate employment between November 29, 1990, the date claimant was released to return to sedentary work, and March 4, 1992, the date of the third knee surgery. Decision and Order at 6. He awarded claimant permanent partial disability benefits under the schedule for this period for a 20 percent impairment. The administrative law judge also found that from the time of the third knee surgery claimant has been totally disabled, as he is unable to perform the identified alternate employment. *Id.* The administrative law judge then awarded permanent total disability benefits based on claimant's average weekly wage at the time of his first knee injury, $963.64, as he found that figure accurately represented claimant's average weekly wage at the time of his second knee injury.[2] *Id.* at 8. Additionally, the administrative law judge concluded that because claimant's back injury is not a separate and distinct injury, but is rather a natural progression of the knee injury, and because benefits are to be calculated based on one average weekly wage, there is no need to "factor out" the economic impact of the knee injury from benefits awarded for the back injury. *Id.* at 9. Employer appeals the decision only with regard to the "factoring out" issue, and claimant responds, urging affirmance.

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[2] The administrative law judge used claimant's average weekly wage at the time of the initial knee injury to calculate benefits for both the second knee injury and for permanent total disability. His reasons for doing so are fully explained in his decision, and his conclusion has not been appealed. *See* Decision and Order at 8.

Employer contends claimant is being overcompensated in this case. It argues that claimant's permanent total disability benefits should be based on the wages he could have earned in alternate employment after the knee injury and before the onset of total disability due to his back condition, rather than on those he earned when he was first injured. Employer thus contends that claimant's permanent total disability benefits should be based on his residual wage-earning capacity after the knee injury alone of $170 per week. In this way, employer contends, the economic effect of claimant's scheduled injury will be factored out of claimant's award of permanent total disability. Employer contends this case is controlled by the decisions in *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363 (1980); *Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *Frye v. Potomac Electric Power Co.,* 21 BRBS 194 (1988), *overruled on different grounds, Bass v. Broadway Maintenance,* 28 BRBS 11 (1994); *Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988); and *Turney v. Bethlehem Steel Corp.,* 17 BRBS 232 (1985). Claimant argues that these cases are distinguishable and inapplicable.

The Supreme Court held in *PEPCO* that a permanent partial disability resulting from an injury to a member listed under the schedule requires an award of benefits pursuant to the schedule. It rejected the notion that Section 8(c)(21), 33 U.S.C. § 908(c)(21), offered a claimant an alternative measure of compensation. *PEPCO,* 449 U.S. at 268, 14 BRBS at 363; *see also Turney,* 17 BRBS at 234. Following this premise, *Turney* and its progeny have concerned the question of how a claimant is to be compensated for concurrent scheduled and non-scheduled

injuries. For example, in *Bass*, the Board held that if a claimant sustains a harm to a body part not specified in the schedule as a result of an injury to a scheduled member, he may receive benefits under Section 8(c)(21) for the consequential injury as well as benefits under the schedule for the initial injury. *Bass*, 28 BRBS at 17-18. Pursuant to *Frye*, if two injuries are then being compensated separately, any loss of wage-earning capacity due to the scheduled injury must be factored out of the Section 8(c)(21) award. *Frye*, 21 BRBS at 194.

Contrary to employer's assertion, *Turney* and its progeny do not apply to the case before us. Although claimant here sustained two injuries to his knees, for which he was compensated under the schedule, and then he sustained a consequential back injury, as did the claimant in *Bass*, claimant here was ultimately found to be totally disabled. This distinguishing factor is significant: at no time was claimant in this case entitled to concurrent awards under the schedule for his knee injury and Section 8(c)(21) for his consequent back condition. *See* n. 1, *supra*. Therefore, at no time could claimant have received double compensation, as he did not receive concurrent awards. Rather, claimant was entitled to consecutive awards for permanent partial disability pursuant to the schedule from November 1990 to March 1992, and for permanent total disability as of April 8, 1994. There is no concurrent award conflict in this case. *See Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1982), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1983), *cert. denied*, 462 U.S. 110 (1983) (an award under the schedule cannot coincide with an award for permanent total disability benefits); *cf. Brady-Hamilton*

Stevedore Co. v. Director, OWCP, 58 F.3d 418, 29 BRBS 101 (CRT) (9th Cir. 1995) (concurrent awards for permanent partial disability under Section 8(c)(21), and for permanent total disability cannot exceed statutory maximum for permanent total disability).

Moreover, claimant is not being overcompensated by virtue of the fact that his permanent total disability benefits are based on his average weekly wage at the time of his knee injury rather than on the amount claimant could have earned in alternate employment. The administrative law judge found that claimant's back condition was the natural and unavoidable result of his knee condition, and this finding is supported by substantial evidence of record. Accordingly, the compensable injury is claimant's knee injury, and benefits for the consequential back condition must be calculated based on the average weekly wage at the time of the knee injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981); *see* n.2, *supra*. Therefore, we reject employer's argument, and we affirm the administrative law judge's award.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
Administrative Appeals Judge

/s/ James F. Brown
JAMES F. BROWN
Administrative Appeals Judge

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street, Suite 2100
San Francisco, CA 94105

In the Matter of:	)	
DONALD RONNE,	)	CASE NO: 96-LHC-261
Claimant,	)	96-LHC-262
v.	)	OWCP NO: 14-96263
PORT OF PORTLAND,	)	14-106287
Employer,	)	
and	)	
HELMSMAN NORTHWEST,	)	
Administrator.	)	

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For the Respondents

Before: Alexander Karst
Administrative Law Judge

DECISION AND ORDER

This is an action brought under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901 *et seq.*, by Mr. Donald R. Ronne. Mr. Ronne and his employer, Port of Portland, have agreed to a number of stipulations: 1) Mr. Ronne has satisfied the Act's situs and status requirements, and is therefore covered by the Act; 2) Mr. Ronne has been unable to return to his former employment since his second knee injury of October 29, 1989; 3) Mr. Ronne's average weekly wage at the time of his first knee injury was $963.6 [sic], and 4) Mr. Ronne's lower back condition is a sequela of his knee injuries. Unstated, but also implicitly agreed to, is that Mr. Ronne's injuries arose out of and in the course of his employment with Port of Portland. The unresolved issues presented in this case are: 1) the permanence and extent of the claimant's injuries; 2) the claimant's average weekly wage at the time of the second injury, and whether the claimant's earning capacity should be adjusted in the period between his second knee injury and his back injury; and 3) the employer's entitlement to section 8(f) relief.

Mr. Ronne was born on April 27, 1929 and has been a longshoreman since 1953. Tr. at 24, 25. Prior to beginning his waterfront career, he obtained a 9th grade education and served in the U.S. Navy. Tr. at 24, 25. On December 5, 1988, while working on the deck of the vessel Harbour Bridge, Mr. Ronne slipped on some oil and landed on his knees and elbows. CX 1. The fall resulted in a complex tear in his right knee's medial meniscus. CX 14. On December 9, 1988, Dr. A. Brooke Benz examined the claimant, and noted pain and swelling in his knee. CX 13.

He told Mr. Ronne to "take it easy." *Id.* Mr. Ronne ceased working and came under the care of Dr. Ira Weintraub, a board-certified orthopedic surgeon. CX 50. Dr. Weintraub performed an arthroscopic partial medial meniscectomy on February 14, 1989. CX 15 at 19. After the surgery, Mr. Ronne began a prolonged physical therapy regimen. CX *passim.*

Approximately 5 months after the surgery, Dr. Weintraub noted Mr. Ronne's improvement and released him to work, at full duty, as of August 14, 1989. CX 15 at 22. Mr. Ronne returned to Port of Portland that day, and began work. CX 43 at 184A. The following month, on September 21, 1989, Mr. Ronne again saw Dr. Weintraub. EX 15 at 22. The doctor noted that the claimant was still experiencing some pain, but concluded that he was doing "extremely well" and was able to climb ladders and work on the cranes. *Id.* He went on to state that Mr. Ronne had become medically stationary, and suffered a 20% permanent leg impairment. *Id.*

Some five weeks later, on October 29, 1989, Mr. Ronne was climbing a crane when he experienced a significant pain in the back of his right knee. CX 15 at 23, CX 19. A Baker's cyst was diagnosed. CX 19. The same condition had been diagnosed after the first injury as well.[1] CX 14. He again ceased working, and has since never been released to waterfront work by his treating physician, Dr. Weintraub. Tr. at 207. On January 24, 1990, Dr. Weintraub performed a second surgery on Mr. Ronne,

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[1] It is undisputed that this second incident constituted a new injury.

which included another arthroscopic partial medial meniscectomy, as well as debridement of the right knee. CX 15 at 24.

After the second surgery, Mr. Ronne's knee did not improve markedly, and Dr. Weintraub began to consider him a candidate for a tibial osteotomy. CX 15 at 25. Mr. Ronne considered the osteotomy for the greater part of 1990, until deciding on November 29, 1990, that he did not want the surgery. CX 15 at 26. Noting that the claimant did not want the surgery, Dr. Weintraub declared him medically stationary, and opined that it was unlikely that he would return to his former work. CX 15 at 27. He stated that he could, however, perform some sort of "more sedentary" work. *Id.* On May 13, 1991, however, Mr. Ronne told Dr. Weintraub that he was again considering the osteotomy, which led the doctor to state that he was, in fact, not medically Stationary. *Id.*

At the employer's request, Mr. Ronne was seen by Dr. John Vessely on May 29, 1991. EX 6B. Dr. Vessely stated first that "his disability is out of proportion to the clinical findings," but went on to say that he should not engage in climbing. *Id.* at 152. Dr. Vessely assigned a 20% disability rating to the claimant's leg, a finding in which Dr. Weintraub concurred.[2] *Id.*, CX 28. He suggested that Mr. Ronne could work as a walking boss. EX 6B at 152. Finally, he believed Mr. Ronne was medically stationary and recommended against the tibial osteotomy. *Id.* Dr. Vessely reported on the claimant again on July 1, 1991,

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[2] This disability rating is the same as was described by Dr. Weintraub after the first injury and surgery.

after reviewing additional records. EX 6D. At that time, he stated that he did not feel the claimant could return to work at Port of Portland. *Id.* He also noted that he was not "so sure that there was any significant aggravation or contribution from the October 29, 1989 episode," and emphasized the degenerative changes in the claimant's knee. *Id.*

Dr. Weintraub performed a tibial osteotomy on March 4, 1992. CX 32 at 95. On April 13, 1992, Dr. Weintraub noted that the knee looked "perfect" and had healed. CX 15 at 31. Mr. Ronne began physical therapy. *Id.* In a chart note dated July 23, 1992, Dr. Weintraub reported that the claimant was still complaining of some discomfort in his knee, and had begun to feel discomfort in his hip and lower back. *Id.* at 32. Mr. Ronne continued to complain of knee and, increasingly, back pain throughout 1992. *Id.* at 33-34. On December 14, 1992, Dr. Weintraub wrote "I doubt he will return to his old job." *Id.* at 34. The next day, December 15, 1992, Dr. Vessely concurred that Mr. Ronne would not be able to return to crane work, declared him medically stationary, and again stated that he had a 20% permanent impairment in his leg. EX 6E. At hearing, Dr. Weintraub testified to a greater degree of post-osteotomy disability – 35%. Tr. at 201. On January 28, 1993, Dr. Weintraub stated that Mr. Ronne had become medically stationary, and would not be able to return to his old job. CX 15 at 34.

Mr. Ronne's back pain persisted throughout 1993. CX 15 at 35-41. In 1994, he was referred to Dr. Michael Mason, who is board-certified in neurological surgery. EX 10A. Dr. Mason diagnosed narrowing of the lumbar canal at L4-5, as well as a probable herniation at L5-S1. CX 48.

Dr. Mason discussed the possibility of a laminectomy with Mr. Ronne, who has so far elected to proceed with more conservative treatment. CX 48, Tr. at 39. Dr. Mason has opined that Mr. Ronne's back condition is a direct result of his knee problems. CX 49. Dr. Weintraub concurred. Tr. at 198.

Since the onset of his back problems, Mr. Ronne has undergone a physical capacities evaluation by occupational therapist Rob Strickland, and a vocational analysis by Hank Lageman, a certified vocational evaluator. Both were retained by the employer. Mr. Strickland administered a number of physical tests, for which he noted fair effort by Mr. Ronne. CX 41 at 169. Among other restrictions, Mr. Strickland noted that Mr. Ronne needed to alternate sitting and standing, and could bend and walk only rarely. *Id.* at 167-68. He concluded that Mr. Ronne could perform light work on a part-time basis. *Id.* at 166. Tests administered by Mr. Lageman showed poor adaptability and concentration, limited stamina, and slow-pace. CX 42. The report stated that Mr. Ronne's "projected endurance is for less than full-time work." *Id.* at 176.

Extent of Disability

To establish a *prima facie* case of total disability, the claimant must prove that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). Once this initial showing is made, the burden shifts to the employer to prove that there is suitable alternate employment available in the community. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988). It is not

enough to demonstrate that work is available generally that the injured worker may be able to perform. "The employer must point to *specific* jobs that the claimant can perform." *Bumble Bee Seafoods v. Director OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980) (emphasis in original). To determine whether the claimant can perform the proposed work, a number of factors must be considered, including the claimant's technical and verbal skills and the likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job. *Hairston*, 849 F.2d at 1196. If the employer establishes that suitable alternate employment is available, the burden shifts back to the claimant to prove that he tried diligently to secure employment, yet was unable to do so. *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

After his December 5, 1988 injury, Mr. Ronne ceased working and was not released to work by Dr. Weintraub until August 14, 1989. CX 18. Port of Portland has not disputed Mr. Ronne's entitlement to temporary total disability during this period. Once Mr. Ronne began to work, he was obviously no longer totally disabled. Upon his return to work, his earnings were equal to or greater than his earnings before his injury. Thus, while he was temporarily partially disabled until September 21, 1989, he suffered no loss of earning capacity and was entitled to no compensation. On September 21, 1989, Dr Weintraub declared Mr. Ronne medically stationary, with a 20% permanent impairment to his leg. He therefore became permanently partially disabled, and entitled to a scheduled award of 20% of 288 weeks of compensation, or 57.6 weeks. The scheduled award ceases, however, upon the claimant's totally disabling second injury of

October 29, 1989. This is dictated by the proposition that the claimant cannot be more than totally disabled. Therefore, the scheduled award is "subsumed in the total disability," but may resume at the end of the period of total disability. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, n.4 (1985).

Port of Portland concedes that Mr. Ronne was unable to return to the waterfront after the October 29, 1989 incident. Employer Post-Trial Memo. at 9. This conclusion is supported by the testimony and records of Dr. Weintraub. *See* CX 15 at 27, Tr. at 207. Moreover, Dr. Weintraub did not release Mr. Ronne to any kind of work until November 29, 1990. Thus, Mr. Ronne's entitlement to total disability from October 29, 1989 to November 29, 1990 is established, and he has made his *prima facie* case of total disability post-November 29, 1990. In support of its contention that suitable alternate employment was and is available to the claimant, and that his disability was, therefore, partial after November 29, Port of Portland relies on the vocational testimony of Michelle Mills-Brooks and the claimant's vocational expert Richard Ross.

Ms. Mills-Brooks testified to the claimant's ability to perform two categories of work: security guard and parking lot attendant. Tr. at 128. She described two types of security guard, i.e., patrolling guards, who walk through a facility every hour or two, and access control guards, who watch access to buildings. Tr. at 134. Ms. Mills-Brooks testified that security companies in Portland "are always seeking manpower." Tr. at 137. This assertion was based on review of classified ads in the Sunday *Oregonian*, and "many, many calls on many, many, different months." Tr. at 138. Regarding the job characteristics of a

parking lot attendant, she stated that the nature of a job, full or part-time, will vary, depending "on what the employer at a given site is able to accommodate." Tr. at 164. She described the duties of parking lot attendant as cashiering from a booth. Tr. at 138. The work requires some reaching and bending, and allows an employee to alternate between sitting and standing. Tr. at 152-55. She testified, as well, that from 1989 to the present, such jobs have been available on a continual basis throughout the year. Tr. at 140. Ms. Mills-Brooks reviewed the claimant's medical records and stated that, before the onset of his back problems, there was no reason that he could not perform either security or parking lot attendant work on a full-time basis. Tr. at 139.

Richard Ross met with Mr.Ronne on April 8 and 10, 1996. Tr. at 86. He interviewed Mr. Ronne and administered a number of standardized tests. Tr. at 86-87. He also reviewed the claimant's and employer's exhibits before testifying. Tr. at 86. On the basis of these materials, Mr. Ross testified that Mr. Ronne's motor skills were "less than competitive," his math was remedial, and his language skills were compatible with his educational background. Tr. at 90-91. He further testified that because of Mr. Ronne's limited education, narrow work history, physical limitations (including the variability of his symptoms), poor adaptability, and age, there is no employment which he could perform on a regular and sustained basis, though he would probably be able to be hired. Tr. at 96, 99. On cross-examination he noted that Mr. Ronne's concentration was poor, perhaps due to pain. Tr. at 107. He noted also that there is a "relatively high demand" for security guard and parking lot attendants,

that part-time work in security was available in Portland, and that these jobs would have provided a starting pay of minimum wage, which in Oregon in 1990 was $4.25. Tr. at 109-110.

Mr. Ross testified, however, that because of the bending required of a parking lot attendant, such work would be inappropriate for Mr. Ronne. Tr. at 115-16. He also stated that Ms. Mills-Brooks' depiction of access control guards was incomplete. Tr. at 178. He testified that few, if any, are "pure" access control guards. *Id.* In fact, these guards make frequent rounds of the facilities to which they are assigned. *Id.* He then stated that such employment would be inappropriate for Mr. Ronne because the physical capacity evaluation done on February 2, 1993, limited him to "rare slow-paced walking." Tr. at 183, EX 8 at 183.

I find that Port of Portland has satisfied its burden of proving suitable alternate employment for the period from November 29, 1990 to March 4, 1992. Mr. Ronne was released to "some more sedentary type work" by Dr. Weintraub on November 29. CX 15 at 27. Both the employer's and the claimant's vocational witnesses testified to broad availability of parking lot attendant and security guard work. Given the claimant's demeanor at the hearing and his work history, I am not convinced that the claimant is so unable to concentrate or keep up his pace that he could not have performed the tasks required by these jobs. Ms. Mills-Brooks testified that with his limitations, before the onset of back problems, he could have worked full-time at either job. Although Mr. Ross ruled out the job of parking lot attendant, he did so on the basis of the bending required by the job. Bending was

not restricted before the onset of Mr. Ronne's back problems.[3] Since the job of parking lot attendant was suitable and available to Mr. Ronne as of November 29, 1990, he was permanently partially disabled from November 29, 1990, until March 4, 1992, and entitled to the balance of the 57.6 weeks of compensation which began to accrue after his first injury, but was interrupted by the second injury and period of temporary total disability.

For the period after the onset of back problems, however, the employer has not satisfied its burden. Mr. Ross testified convincingly that the claimant would not be able to perform the duties of an access control guard or parking lot attendant, given the claimant's limitations on bending and reaching, and walking, as enumerated in the physical capacity evaluation administered by Rob Strickland. Moreover, even had the employer shown the availability of suitable alternate employment, Mr. Ronne successfully demonstrated that he was diligent in his pursuit of work, yet failed to secure it. He apparently applied to some 30 employers, including parking lots and security companies, none of which hired him. Tr. at 50. The extent of the employer's rebuttal evidence appears to be that Mr. Ronne had his cane with him when he visited prospective employers. *See* Tr. at 55, 173. For a person with knee problems, this does not necessarily demonstrate a lack of diligence; it may show prudence.

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[3] The physical capacity evaluation done on February 2, 1993, found bending limited because of low back pain. CX 41 at 167.

Therefore, from the time of his third knee surgery, and thereafter, Mr. Ronne's disability has been total.[4]

Permanency

It is necessary as well to identify the periods of Mr. Ronne's disability which are permanent, and which are temporary. This is relevant to determining when scheduled benefits become due and when the Special Fund must assume responsibility for disability payments. While there is some conflict in case law regarding assessment of permanency, it is settled that the determination is a medical one. *Mason v. Bender Welding and Mach. Co.*, 16 BRBS 307 (1984). As such, a relevant, if not dispositive, consideration is the date a physician designates the claimant as having reached maximum medical improvement. *Trask v. Lockheed Shipbuilding and Const. Co.*, 17 BRBS 56 (1985). However, a claimant may have reached permanency even when future surgery is anticipated. *Worthington v. Newport News Shipbuilding and Dry Dock Co.*, 18 BRBS 200 (1986) (holding that an administrative law judge is not required to find a condition temporary merely because evidence shows that surgery could improve the condition). Indeed, it is possible to find permanency even when a claimant continues to receive medical treatment, if the condition is one of "lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968),

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[4] I note that Mr. Ronne's back problems arose during his recovery from the March 4, 1992 tibial osteotomy, a period in which it is uncontested he was temporarily totally disabled.

cert. denied, 394 U.S. 976 (1969). Another consideration in the instant case is the Board's holding that when a claimant undergoes surgery, permanency can only be reached upon recovery from the surgery. *Walker v. National Steel and Shipbuilding Co.*, 8 BRBS 525 (1978).

After his first injury on December 5, 1988, Mr. Ronne was temporarily disabled until he was declared stationary by Dr. Weintraub on September 21, 1989. This period of permanency was short-lived, however, as he was reinjured on October 29, 1989. After that injury, and resulting surgery, he was again declared stationary by Dr. Weintraub on November 29, 1990. When he determined that Mr. Ronne's condition was stationary, it was with the understanding that Mr. Ronne did not want to undergo the tibial osteotomy which the doctor recommended. When Mr. Ronne expressed interest in the surgery six months later, Dr. Weintraub stated he was, in fact, not stationary, as surgery was anticipated. Mr. Ronne had the surgery approximately ten months later. I find that Mr. Ronne's condition was permanent on November 29, 1990. In this regard, I note that while surgery was being considered as of May of the next year, Mr. Ronne's condition had become, nonetheless, of "lasting or indefinite duration." Were I to find Mr. Ronne's condition temporary at that point, the logical conclusion would be to find him temporary until he had surgery. While he had the surgery ten months later, it could just as easily have been ten years later. If the date of election of surgery were determinative, permanency would cease to be an objective determination about the claimant's condition.

As of his third surgery, on March 4, 1992, Mr. Ronne's condition again became temporary, as he awaited recovery

from the osteotomy. Dr. Weintraub again declared him medically stationary on January 28, 1993. This determination, however, appears to be based solely on his recovery from surgery, and does not take into account of his developing back problems. Because of this failure to incorporate Mr. Ronne's back problem into the assessment of maximum medical improvement, I may reject it. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). In fact, Mr. Ronne's back continued to worsen, and he received treatment from Dr. Weintraub and Dr. Mason, as well as physical therapy. CX 15 at 35-41. Attempts to treat his back condition essentially ceased on April 8, 1994, when Dr. Mason recommended a laminectomy as the logical next step in treatment, a step Mr. Ronne has chosen not to take. CX 48. It is only at this point that his condition appears to be of "lasting or indefinite duration," and it is apparent that it does not await a healing period. Accordingly, I find Mr. Ronne's condition again became permanent on April 8, 1994.

Average Weekly Wage

Since Mr. Ronne was injured, he did not work "substantially the whole of the year" prior to his second injury. Therefore, his average weekly wage cannot be computed under section 10(a). Since there is no evidence of the wages of other employees section 10(b) is also inapplicable. By default, then, I must apply section 10(c) to determine Mr. Ronne's average weekly wage. The claimant would have me calculate the average weekly wage according to the sixteen weeks prior to the second injury. The employer, contending that this period is inadequate to extrapolate an average wage for the entire year,

suggests the claimant's average weekly wage prior to the first injury is more representative. Both assertions have merit. There are many factors which I may consider in my assessment of average weekly wage under 10(c). Among them are the claimant's actual earnings at the time of injury, *Harrison v. Todd Pac. Shipyards*, 21 BRBS 339 (1988), and the earning pattern of the claimant over the years prior to the injury. *Cummins v. Todd Shipyards*, 12 BRBS 283 (1981). Ultimately, however, I find convincing the employer's contention that basing the claimant's average weekly wage on the short sixteen week wage-earning period before Mr. Ronne's second injury would result in distorted average weekly wage.[5] I find that the stipulated average weekly wage prior to the first injury of $963.64 accurately represents the claimant's average weekly wage at the time of the second injury, resulting in a compensation rate of $642.43[6]. In this regard, I note that the first injury occurred less than one year before the second, and is therefore temporally proximate. I also note that,

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[5] Moreover, while both the claimant and the employer refer to a sixteen week period, Mr. Ronne appears to have actually worked for only ten weeks, during the period from August 14, 1989, when he was released to work by Dr. Weintraub, and October 29, 1989, the date of the second injury. While I realize that under ILWU/PMA contracts, rights to pay guarantee and holiday payments may vest at different times, no evidence has been presented explaining why consideration of sixteen weeks is appropriate.

[6] The maximum compensation available at the time of the first injury was $636.24. By the time of the second injury, it had risen to $660.62. Since 66 2/3 of $963.64 is $642.34, Mr. Ronne was entitled to the full two-thirds of his average weekly wage at the time of the second injury. Moreover, only 10 days of his scheduled award is payable at $636.24.

because it was apparently based on two years of Mr. Ronne's career, it more accurately depicts his consistent earning capacity. *See* CX 43.

The greater part of Port of Portland's Post-Trial Memorandum is devoted to the contention that while Mr. Ronne is entitled to a scheduled award for his second knee injury, followed by a subsequent unscheduled back injury award, the award for the back condition should be calculated "after factoring out the earning capacity impact of the knee condition."[7] Emp. Post-Trial Memo. at 6. The employer cites two cases in support of this proposition, *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985), and *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988). Both are distinguishable from the instant case, however, in that the "factoring out" language applied to distinct, separate injuries, the first scheduled, the second unscheduled. The back injury presented here is not a distinct injury, but a continuation of the October 1989 knee injury.

While *Turney* and *Frye* involved section 8(c), the employer appears to contend that "factoring out" should apply as well when the initial scheduled injury progresses to total disability under section 8(a). The employer asserts that if; after the October 1989 knee injury, the claimant could have earned $170 per week as a

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[7] Port of Portland does not contend that any "factoring out" should occur between the two scheduled knee injuries, nor could it, as there is no evidence of any loss of wage-earning capacity after Dr. Weintraub released Mr. Ronne to regular duty at Port of Portland. In fact, his wage-earning capacity remained at least the same as before the first injury.

security guard, then his average weekly wage for purposes of determining total disability compensation should be that hypothetical security guard wage, not his pre-knee injury longshore wage. The Board has come to a contrary conclusion, holding that in natural progression cases such as this, the average weekly wage is calculated as of the time of the initial injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Section 8(f) Relief

In order to obtain the benefits of subsection 8(f), an employer must show (1) that the claimant had a pre-existing permanent partial disability, (2) that the pre-existing disability contributed in the statutorily prescribed manner to the claimant's ultimate permanent disability, and (3) that the pre-existing disability was manifest to the employer prior to the injury for which compensation is being awarded. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). In general, if subsection 8(f) is found to apply an employer is relieved of the responsibility for paying permanent disability compensation after 104 weeks. However, the 104-week period in subsection 8(f) does not include any periods in which temporary disability payments were owing. *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989).

The requirements for section 8(f) relief with respect to the October 29, 1989 injury are plainly met. Indeed, the Director concedes that the employer is entitled to section 8(f) relief if the disability arising from the October 29, 1989 injury is permanent and total. The Special Fund

shall therefore become liable for permanent total disability payments as of 104 weeks after April 8, 1994.

ORDER

1. The employer shall pay the claimant compensation for temporary total disability from December 6, 1988, until August 13, 1989, at the rate of $636.24 per week;

2. The employer shall pay the claimant compensation for temporary total disability from October 30, 1989, until November 29, 1990, and from March 4, 1992 until April 7, 1994, at the rate of $642.43 per week;

3. The employer shall pay the claimant compensation for permanent partial disability for 20% of 288 weeks, or 57.6 weeks, 1 3/7 of which shall be paid at the rate of $636.24 per week, and the remainder of which shall be paid at the rate of $642.43 per week;

4. The employer shall pay the claimant compensation for permanent total disability from April 8, 1994 until 104 weeks thereafter;

5. The Special Fund shall thereafter pay the claimant compensation for permanent total disability;

6. The employer shall receive credit for all compensation already paid for these injuries;

7. The employer shall pay interest on all due but unpaid compensation from due date to payment date, at the rate specified in 28 U.S.C. § 1961 on the date of the filing of this order;

8. The claimant's counsel may file a petition for attorney's fee and costs within 15 days. The employer may comment or object to it within 15 days thereafter.

/s/ Alexander Karst
ALEXANDER KARST
Administrative Law Judge

Dated: Feb. 8, 1997
San Francisco, CA